

We appreciate the opportunity to comment on the "Non-Paper (for purposes of discussion) on principles of international law relevant to counter-terrorism," developed by COJUR. We understand that this Non-Paper does not reflect a formal or agreed position among EU Member States; rather, it represents a basis for discussion among EU Member States, and between COJUR and the Legal Adviser of the U.S. Department of State. In its current form, we do not believe that this document could serve as a statement of agreed principles between the EU and the United States, although certain elements in the paper might foster future discussions regarding a set of agreed principles applicable to problems of mutual concern.

The following represents the comments of the Legal Adviser of the U.S. State Department on the Non-Paper, keyed to the numbering used in the Non-Paper. We look forward to further discussions on these issues.

Introductory Paragraph

- We agree with this point, although the language should clearly refer to *a state's obligations* under *applicable* international law. This would recognize that different states may have different obligations under the legal regimes listed. Compare the EU-U.S. Summit Declaration, which stated, "Consistent with our common values, we will ensure that measures taken to combat terrorism comply fully with our international obligations, including human rights law, refugee law and international humanitarian law."
- We explain below our position that one or more of these categories may not apply to certain situations in armed conflicts.
- Also, as a general matter, the United States prefers the phrase "law of war" or "law of armed conflict" rather than "international humanitarian law."

Element 1

- We would agree with the first and second paragraphs.
- Third paragraph: Regarding the first sentence, the United States believes that its conflict with al Qaeda does constitute an armed conflict under the law of war. We would agree with the more general proposition that the "Global War against Terrorism" is not a universal armed conflict in the practical or legal sense, because the United States is not in a state of armed conflict with all terrorists everywhere in the world. The United States interprets the second sentence as indicating a recognition that the law of war is an appropriate framework to apply to the use of force against and detention of members of al Qaeda and other terrorists in certain situations. The United States would agree with this proposition. We also believe that an armed conflict, whether against a non-state actor or against a state, need not take place in a single territory or fixed area;

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rather, the location of the conflict depends on a factual assessment of where hostilities occur.

This is not to say that there are no constraints on this use of force: traditional rules such as necessity, proportionality, and immediacy all come into play, as does the willingness and ability of the state from which the non-state actor is operating to respond to the situation. It also should be stressed that the United States does not believe that it must rely exclusively on the law of war to address the al Qaeda threat in every country. A criminal law framework may be appropriate where the United States is able to use law enforcement measures and the country in which the al Qaeda member is located is willing and able to cooperate effectively in support of such measures.

- Fourth paragraph: We would agree with this proposition.

Element 2

- The U.S. Supreme Court in the Hamdan decision determined that Common Article 3 applied as a matter of treaty law to the U.S. conflict with al Qaeda. The Supreme Court did not address whether Common Article 3 applies as a matter of customary international law. The Supreme Court's determination that Common Article 3 applies to its armed conflict with al Qaeda as a matter of treaty law has eliminated the need for the United States to determine whether Common Article 3 applies to that conflict as a matter of customary international law going forward.
- Although U.S. officials have stated in the past that the United States supported many of the fundamental guarantees contained in Article 75 of Additional Protocol I, we have not made a determination that Article 75 as a whole reflects customary international law, especially in the context of a conflict with a non-state actor that intentionally disregards the law of war. Nor have we made such a determination about Articles 4-6 of AP II.

Element 3

- First sentence: We would agree that persons taking part in hostilities who are not entitled to combatant immunity may be prosecuted for war crimes, just as lawful combatants may be prosecuted for war crimes. Prosecution for "participation in hostilities" raises more difficult questions. U.S. law, including the Military Commissions Act of 2006, does not provide for prosecuting an individual not entitled to combatant immunity merely for possessing the *status* of "being an unlawful combatant."
- Second sentence: We would agree that this sentence states a rule in traditional international conflicts between two States Parties to the Geneva Conventions. However, this principle is not a legal requirement in non-international armed

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conflict. Nevertheless, the U.S. Department of Defense Detainee Directive (2310.1E) states that all persons taken into the control of DOD personnel will be provided with prisoner of war protections until some other legal status is determined by competent authority.

- Third sentence: We would agree that the law of war contains certain minimum standards of protection for those persons determined not to be prisoners of war. The precise contours of those protections, however, may turn on the nature of the particular conflict, the nationality of the individual, and other factors. As noted above, the Supreme Court in the Hamdan decision determined that Common Article 3 applies as a treaty law matter to the conflict with al Qaeda. The recently-promulgated DOD Detainee Directive (2310.01E) requires all persons subject to the Directive to apply, at a minimum, without regard to a detainee's legal status, the standards articulated in Common Article 3. Further, the Directive in some respects establishes requirements that exceed Common Article 3.

Element 4

- First paragraph: We do not believe that the first sentence accurately summarizes the ICJ's description of the relationship between the two bodies of law. (The second sentence of the second paragraph does accurately summarize that description.) There will be circumstances in which the two bodies of law are mutually exclusive – as in peacetime, when the law of war is inapplicable – and circumstances in which they may not be – as in a non-international armed conflict. We believe the second sentence is better formulated to state, “Whether international human rights law applies to the conduct of a particular state during an armed conflict is a case-by-case inquiry.”
- Second paragraph: We would agree with this paragraph in principle, keeping in mind our view that the ICCPR and certain provisions of the Convention Against Torture do not apply extraterritorially, and that during armed conflict, the law of war will serve as the *lex specialis*. (This latter point is consistent with the ICJ's opinion in the Nuclear Weapons case, in which the Court stated that, in determining what constitutes an arbitrary deprivation of life in such a scenario, the relevant law would be “the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”) We also would note that, to our knowledge, no state ever has derogated formally from its obligations under the ICCPR in advance of, or as the result of, an international armed conflict in which it participated.

Element 5

- We consider most obligations under the Geneva Conventions as just that – obligations on States Parties. However, the first sentence of element 5 treats procedural protections as individual rights, rather than obligations on a state to provide those protections. We would structure this paragraph to reflect that states

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are obligated to provide detainees with particular forms of process, depending on the status of the detainee and the applicable international and domestic law. We would agree with the list of possibly relevant sources of international law that may apply to States Parties to those treaties, although the list might also include domestic law.

Element 6

- We do not agree with this element.
- For reasons we have discussed previously, the United States consistently has interpreted the phrase “within its territory and subject to its jurisdiction” in the ICCPR to mean that the ICCPR applies to individuals who are both within a state’s territory and subject to that state’s jurisdiction.
- Article 2(1) of the Covenant states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant, without distinction of any kind.” Hence, based on the plain and ordinary meaning of its text, this Article establishes that a State Party is required to ensure the rights in the Covenant only to individuals who are both *within* the territory of the State Party *and* subject to that State Party’s sovereign authority.
- There is no ambiguity in the language and therefore no need to resort to negotiating history. But resort to the *travaux préparatoires* further supports the U.S. reading of the provision. In 1950, the draft text of Article 2 then under consideration by the Commission on Human Rights would have required that states ensure Covenant rights to everyone “within its jurisdiction.” The United States, however, proposed the addition of the requirement that the individual also be “within its territory.” Eleanor Roosevelt, the U.S. representative, emphasized that the United States was “particularly anxious” that it *not* assume “an obligation to ensure the rights recognized in it to citizens of countries under United States occupation.” Ultimately, the U.S. amendment was adopted at the 1950 session by a vote of 8-2 with 5 abstentions. Subsequently, after similar debates, the United States and others defeated French proposals to delete the phrase “within its territory” at both the 1952 session of the Commission and the 1963 session of the General Assembly.
- We understand that COE Member States interpret this provision differently, partly as a result of ECHR case law, which does *not*, of course, apply to the United States. Nor does an Advisory Opinion of the International Court of Justice bind any state.

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Element 7

- General comment: We do not agree that the first paragraph of this element is a correct statement of the legal principle. It is the policy of the United States, however, not to hand over an individual to another state where it is more likely than not that he or she will be tortured.
- First paragraph, first sentence: The United States believes that Article 3 of the Convention Against Torture does not impose obligations on a State Party with respect to an individual who is outside the territory of that State Party. The United States bases its view on the text of the Convention, the negotiating history, and the U.S. record of proceedings related to ratification, all of which support a view that Article 3 of the Convention applies only to persons within the territory of the United States.
- Article 3 speaks of actions taken with respect to persons already present in the territory of a State. The terms "expulsion," "deportation," and "extradition" describe conduct taken against individuals within a State Party's territory. If there is any debate about whether Article 3 applies outside the territory of a State Party, it turns on whether the term "return ('refouler') prohibits the return of persons by a State Party in those circumstances covered by Article 3, regardless of where the officials and the individual benefiting from the protection are located.
- In the U.S. view, the term "return ('refouler') is limited to actions occurring within the territory of a State Party. The U.S. Supreme Court construed the same term, as employed in the Refugee Convention, and found that both the text and the negotiating history of Article 33 "affirmatively indicate that it was not intended to have extraterritorial effect."
- The negotiating history of Article 3 of the CAT confirms this view. The original Swedish proposal spoke only of expulsion or extradition, and did not employ the term "return ('refouler')." However, when negotiators revised the draft to expand the prohibition to include "return ('refouler')," considerable discussion ensued over the advisability of including the term, including references to ambiguity surrounding the extra-territorial reach of the provision. At no point was there agreement that the term was intended to apply to individuals located outside the territory of a State Party. Additionally, both the text and the negotiating history of the CAT make clear that negotiators used explicit language applying certain provisions of the CAT extra-territorially when they intended those provisions to have extra-territorial effect. The negotiators' failure to do so in Article 3 further confirms that there was no express intent to apply Article 3 extra-territorially.
- First paragraph, second sentence: This sentence re-states Article 3(1) of the CAT. At the time the United States became a State Party to the CAT, the U.S. instrument of ratification contained an understanding, which made clear that the United States interprets the phrase "where there are substantial grounds for

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believing that he would be in danger of being subjected to torture” to mean “if it is more likely than not that he would be tortured.”

- First paragraph, third sentence: The EU Guidelines on Torture contain policies to govern action by EU Member States toward third countries. The Guidelines do not contain obligations that are binding on non-EU states.
- Second paragraph: We do not agree with this statement. The principle, as drafted, appears to conflict directly with other principles in the document that recognize that access to court to challenge detention would not be a *due process requirement* where the law of armed conflict applies as the *lex specialis*. In many circumstances, someone arrested and transferred from one State to another will have access to a court before he or she is transferred – as with an extradition or deportation process. However, there will be circumstances in which this principle will not or cannot apply. This paragraph appears to be directed toward prohibiting renditions, including the type of rendition that occurred in the case of Carlos the Jackal, a rendition that the ECHR upheld. (Carlos did not receive access to a Sudanese court before France rendered him from Sudan to the French court system.) Renditions are not per se unlawful.
- Third paragraph: We would not agree with this statement as drafted because it is overly broad. In an international armed conflict covered by Common Article 2 of the Geneva Conventions, we would agree that a Detaining Power may only transfer protected persons who are aliens in its territory to another Power that is a party to the Fourth Geneva Convention after the Detaining Power has satisfied itself of the willingness and ability of the other Power to apply that Convention. Likewise, we would agree that the same rule applies regarding prisoners of war pursuant to Article 12 of the Third Geneva Convention. The Non-Paper frames these rules as applying to all detainees held in an international armed conflict, which exceeds the scope of the applicable treaty provisions.

Element 8

- First paragraph: We would agree that it is never permissible to detain an individual unlawfully, but we believe that this statement is overly broad and vague. We also would agree that, where the ICCPR applies, a State Party shall not deprive someone of his liberty except on grounds established by law, in accordance with such procedures as are established by law. We reiterate the long-standing principle that a state may detain a combatant during an armed conflict and is not required to charge him with a criminal offense.
- Second paragraph: We disagree with the assertions that a state may not detain an individual in an undisclosed location, and that such locations constitute a “legal vacuum” and therefore are not in conformity with international law. As we have discussed, we do not believe that there is an international legal obligation to provide notice to the ICRC regarding the detention of unlawful enemy

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combatants. There is no requirement in the Geneva Conventions (including in Common Article 3, which provides the legal standard governing the treatment of al Qaeda detainees) to provide the ICRC notice of or access to detained individuals who are neither prisoners of war nor protected persons. Further, even with regard to those entitled to "protected person" status, Article 5 of the Fourth Geneva Convention permits an occupying power to detain spies, saboteurs, and persons under definite suspicion of activity hostile to the security of the occupying power without communication where absolute military security requires.

- Third paragraph: We are unaware of any applicable human rights law that prohibits *incommunicado detention per se*, although where the ICCPR is applicable, we recognize that Article 9 of that treaty would require a state to provide someone arrested or detained with proceedings before a court to decide on the lawfulness of his or her detention. Further, we do not agree that there is a legally binding obligation to register unlawful enemy combatants with the ICRC. We agree with the last sentence related to non-international armed conflict.
- Fourth paragraph: This paragraph seems to contain a factual assertion, not a legal principle. Although it may be true, in the abstract, that torture or cruel, inhuman, or degrading treatment (CIDT) may be facilitated by prolonged incommunicado or secret detention, it is equally true that torture or CIDT may be facilitated by other aspects of detention. As noted above, we believe that detentions carried out under the law of war may under certain circumstances be conducted in undisclosed locations.

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